Office - Supreme Court
FILED
MAY 21 19[illegible]
HAROLD B. WILLEY, [illegible]

IN THE

Supreme Court of the United States

October Term, 1952

No. [redacted]85

JAMES W. MUIR,

Petitioner,

vs.

LOUISVILLE PARK THEATRICAL ASSOCIATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT L. CARTER,
THURGOOD MARSHALL,
BENJAMIN F. SHOBE,
Counsel for Petitioner.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
of Counsel.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
49

TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statement 2

General Background 2

The Leasing Agreement Between the City and Respondent 4

Specifications of Error 7

Reasons For Allowance of the Writ 8

1. This case seriously affects the right of Negro citizens to enjoy the benefits of publicly-owned recreational facilities 8

2. Whether the respondent's operations in this case constitute state action presents a substantial federal question which should be independently determined by this Court 11

3. Decisions among state and lower federal courts with respect to the status of leasing arrangements between municipalities and private organizations are in conflict and should be resolved 14

4. The decision below is in conflict with principles established in decisions of this Court, particularly *Nixon* v. *Herndon* 18

5. The decision in this case is in conflict with the principles enunciated by this Court in *Nixon* v. *Condon*, *Smith* v. *Allright* and *Terry* v. *Adams* with respect to the delegation of state authority 20

PAGE

6. The decision of the Court below conflicts with well-settled doctrine of this Court that rights guaranteed under the 14th Amendment are personal and present 24

Conclusion 25

Appendix A—Agreement 26

Appendix B—Statutes of Kentucky—Applicable to Parks in Cities of the First-Class 31

Table of Cases Cited

Baskin v. Brown, 174 F. 2d 391 (C. A. 4th 1949) 21n
Beal v. Holcombe, 193 F. 2d 384 (C. A. 5th 1951) 9n
Board of Park Commissioners v. Speed, 215 Ky. 319, 285 S. W. 212 (1926) 13, 18, 20
Boyer v. Garrett, 183 F. 2d 582 (C. A. 4th 1950), cert. denied 340 U. S. 912 ..... 9n

Camp v. Recreation Board for the District of Columbia, 104 F. Supp. 10 (D. C. 1952) 9n
Culver v. City of Warren, 84 Ohio App. 373, 83 N. E. 2d 82 (1948) 9n, 12n, 15, 22

Dorsey v. Stuyvesant Town Corp., 299 N. Y. 512, 87 N. E. 2d 541 (1949), cert. denied 339 U. S. 981 22
Draper v. City of St. Louis, 92 F. Supp. 546 (E. D. Mo. 1950), appeal dismissed 186 F. 2d 307 (C. A. 8th 1950) 9n
Durkee v. Murphy, 181 Md. 259, 29 A. 2d 253 (1942) 9n

Grovey v. Townsend, 295 U. S. 45 15

Hague v. Congress of Industrial Organization, 307 U. S. 496 ..... 20n
Harris v. City of Daytona Beach, 105 F. Supp. 572 (S. D. Fla. 1952) 9n
Harris v. City of St. Louis, 233 Mo. App. 911, 111 S. W. 2d 995 (1938) 15, 16, 22

PAGE

Kern v. City Commissioners, 151 Kans. 565, 100 P. 2d 709 (1940) 9n, 12n, 15, 22

Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (C. A. 4th 1945), cert. denied 326 U. S. 721 ..... 15, 22, 23

Law v. Mayor and City Council of Baltimore, 78 F. Supp. 346 (Md. 1948) 9n

Lawrence v. Hancock, 76 F. Supp. 1004 (S. D. W. Va. 1948) 9n, 13, 15, 16, 22

Lopez v. Seccombe, 71 F Supp. 769 (S. D. Cal. 1944) 9n

McCabe v. Atchison, T. & S. F. Ry. Co., 235 U. S. 151 25

McLaurin v. Oklahoma State Regents, 339 U. S. 637 19

Missouri ex rel. Gaines v. Canada, 305 U. S. 337 19

Modern Amusements, Inc. v. New Orleans Public Service, 183 La. 848, 165 So. 137 (1935) 15, 16, 23

Nash v. Air Terminal Services, 85 F. Supp. 545 (E. D. Va. 1949) 10n, 19, 22, 23

Nixon v. Condon, 286 U. S. 73 ..... 14, 15, 20-24

Nixon v. Herndon, 273 U. S. 536 ..... 15, 18, 19, 20

Norris v. Mayor & City Council of Baltimore, 78 F. Supp. 451 (Md. 1948) 10n

Park Commissioners of Ashland v. Shanklin, 304 Ky. 43, 199 S. W. 2d 721 (1947) 13, 14, 18, 20

Public Utilities Commission of the District of Columbia v. Pollack, 343 U. S. 451 19

Rice v. Arnold, 340 U. S. 848, vacating 45 So. 2d 195 (Fla. 1950), reaffirmed 54 So. 2d 114 (Fla. 1951), cert. denied 342 U. S. 896 ..... 9n

Rice v. Elmore, 165 F. 2d 387 (C. A. 4th 1947), cert. denied 333 U. S. 875 ..... 15, 21n

Shelley v. Kraemer, 334 U. S. 1 ..... 15, 25

Sipuel v. Board of Regents, 332 U. S. 631 19

Smith v. Allwright, 321 U. S. 649 ..... 15, 20-24

PAGE

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192 15
Sweatt v. Painter, 339 U. S. 629 19
Terry v. Adams, —— U. S. ——, 21 U. S. L. Week 4346 (May 4, 1953) 15, 20-22, 24
Tunstall v. Brotherhood of Locomotive Firemen, 323 U. S. 210 15
United States v. Classic, 313 U. S. 299 15
Warley v. Board of Park Commissioners, 233 Ky. 688, 26 S. W. 2d 554 (1930) 18
Williams v. Kansas City, 104 F. Supp. 848 (W. D. Mo. 1952) 9n

Other Authorities Cited

Barnett, What is State Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution? 24 Ore. L. Rev. 227 (1945) 15n
Dulles, America Learns to Play (1940) 8n
Gardner, Recreation's Part in Mental Health, 45 Recreation 446 (1952) 8n
Hewitt, A Backward Glance at '49, 35 Equity 11 (April, 1950) 12n
Hewitt, The Survey of Summer Stock, 34 Equity 13 (April, 1949) 12n
Hjelte, The Administration of Public Recreation (1940) 8n
Institute for Training in Municipal Administration, Municipal Recreation Administration (1945) 8n
National Park Service, U. S. Dept. of Interior, Fees and Charges for Public Recreation (1939) 10n

PAGE

National Recreation Association, Recreation and Park Year Book (Mid-century edition 1951) 8n, 9n

Neumeyer, Leisure and Recreation (1936) 8n

Recreation, Encyclopedia of Social Sciences (1934). 8n

Rogers, The Child at Play (1932) 8n

Slavson, Recreation and the Total Personality (1946) 8n

Steiner, Americans at Play (1933) 8n

The Thirty-third National Recreation Congress-in Review, 45 Recreation (1951) 8n

Statutes Cited

Ky. Rev. Stat. § 97.252 (1948) 20n

Ky. Rev. Stat. § 97.290 (Baldwin's certified ed., 1942) as incorporated into Ky. Rev. Stat. § 97.250 (1948) 20n

IN THE

Supreme Court of the United States

October Term, 1952

No.

JAMES W. MUIR,

Petitioner,

VS.

LOUISVILLE PARK THEATRICAL ASSOCIATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, James W. Muir, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on February 20, 1953.

Opinions Below

The memorandum opinion of the United States District Court for the Western District of Kentucky is reported at 102 F. Supp. 525 (R. 20). The opinion of the Court of Appeals for the Sixth Circuit is not yet reported and may be found in the record at page 83.

Jurisdiction

The judgment of the Court of Appeals was entered on February 20, 1953 (R. 83). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether respondent, who leases from the City of Louisville a publicly owned and maintained amphitheatre located in a public park, can refuse petitioner admission thereto on tender of the required admission fee solely because of race and color, without violating his rights to equal protection of the laws within the meaning of the Fourteenth Amendment.

Statement

General Background

Petitioner, together with two other plaintiffs below—Mona Carroll and P. O. Sweeney—brought an action in the District Court against the City of Louisville, T. Byrne Morgan, Director of Parks and Recreation for the City, and the Louisville Park Theatrical Association, respondent here. The action, brought as a class suit on behalf all other Negroes similarly situated, sought to establish the right of Negro citizens of Louisville to the use of park and recreational facilities without discrimination on account of race and color where such facilities are owned by the City and maintained in whole or in part out of public funds (R. 2-8).

The City of Louisville maintains segregated parks for its Negro and white citizens. Since 1928 regulations have been in effect whereby certain parks are designated for the exclusive use of white persons while others are maintained for the exclusive use of Negroes (R. 43). There are 21 white parks with a total acreage of 2,027 acres; in contrast, 10 parks are provided for Negroes with a combined acreage of 112 acres (R. 44-45).

While neither a golf course, a fishing lake nor an amphitheatre is provided in the Negro parks, such facilities are provided by the City in the white parks (R. 43). Plain-

tiff Sweeney, desiring to play golf, requested of the City and its Director of Parks and Recreation permission to play golf on the above City-operated golf courses. His request was admittedly denied solely because he was a Negro (R. 43). Similarly, plaintiff Carroll, an infant, through her father, asked permission to use the fishing lake in Cherokee Park. This request, too, was denied solely because of plaintiff Carroll's race and color (R. 43).

In Iroquois Park, the largest park in Louisville and one designated for the use of white persons, the City maintains an open-air amphitheatre known as Iroquois Amphitheatre (R. 46). Under an agreement with the City, the Louisville Park Theatrical Association, respondent here, presents musical entertainment during the summer season. On July 22, 1949, petitioner, James Muir, sought admission to Iroquois Amphitheatre to see a performance of "Blossom Time", a musical production presented by respondent association. Although this was a performance to which the general public could gain admission by paying an admission fee, respondent refused to sell petitioner a ticket solely because he was a Negro (R. 19, 47).

The three plaintiffs below instituted this action on July 28, 1949, seeking a declaratory judgment and injunctive relief on the ground that the refusal to admit them to the several facilities violated the right of each plaintiff to the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. 2-9). A stipulation of facts was filed on August 6, 1951 (R. 18-19), and on the same date a hearing on the merits was held in the District Court (R. 41-62).

On September 14, 1951, the District Court filed its opinion and findings of fact and conclusions of law (R. 20-35). On January 18, 1952, final judgment was entered (R. 36-38). That court found that the City violated the Fourteenth Amendment in providing golf facilities for

white citizens without furnishing similar recreational facilities for Negroes. The City was enjoined from excluding plaintiff Sweeney and other Negroes from such golf courses on the basis of race and color. The District Court dismissed the complaint with respect to plaintiff Carroll on the ground that she had failed to produce any evidence to support her claim that the fishing facilities afforded Negroes were substantially inferior to those provided for white persons (R. 37). Plaintiff Carroll took no appeal.

The court also dismissed the complaint as to petitioner, holding that respondent was a private corporation not subject to the Fourteenth Amendment. The court further held that the City, in allowing respondent to lease Iroquois Amphitheatre for a "private operation for a short period of time", did not violate the Fourteenth Amendment where there was no showing that Negro organizations were not allowed to lease the Amphitheatre under similar terms on a non-discriminatory basis (R. 37). On appeal the Court of Appeals for the Sixth Circuit affirmed (R. 83).

The Leasing Agreement Between the City and Respondent

The facts with respect to the use of Iroquois Amphitheatre are not in dispute. They are contained in the stipulation of facts (R. 18-19, 42-47), three agreements entered between the Association and the City (R. 62-79) and the current agreement appended hereto as Appendix A.

In 1938, the Board of Park Commissioners of the City of Louisville erected an open-air amphitheatre in Iroquois Park (R. 18). Iroquois Amphitheatre was constructed and equipped out of public funds supplied by the Federal Works Progress Administration, with the exception of $5000 contributed by respondent (R. 18). Since 1938 a series of agreements have been in effect between the City and respondent, a non-profit domestic corporation, whereby the latter

was given the "exclusive" use of the Amphitheatre during the summer season.

The first agreement granted respondent the exclusive use of the Amphitheatre from May 1 until September 30 during the years 1938-1942 (R. 62-71). The second agreement extended these provisions for a period of five additional years (R. 71-74). The third agreement, the one in force at the time petitioner was refused admission, covered the period 1947-1951 and is substantially similar to the earlier contracts (R. 74-79).

Under the terms of this agreement, respondent was granted the exclusive use of the Amphitheatre during the period May 1 to September 30 for the purpose of rehearsing or presenting musical, dramatic, athletic or any other form of entertainment it might select (R. 74-75). Respondent was permitted to charge an admission fee, provided such admission fees and charges were "reasonable and consistent with the desire of both [the City and the Association] to increase the use of Iroquois Park by making the entertainment presented at said Amphitheatre available to the public at low cost" (R. 75-76).

Respondent was not required to pay rent. It agreed to pay the electric bill from May 1 until September 30 and the salaries of all persons employed in connection with any entertainment provided (R. 76). It further agreed to pay over to the City all net profits realized from its operations after deducting the initial $5000 contributed by it to the cost of constructing the Amphitheatre (R. 77-78).

The Association was required to furnish to the City on January 1 of each year an audited statement of monies received and expended in connection with its operation of the Amphitheatre (R. 77). This statement was also to include a listing of all entertainment produced under its auspices during the preceding season, the admission fees charged, the number of persons attending, and such

other information as would help the City in determining whether the operation of the Amphitheatre had "in fact contributed materially to the use and enjoyment of the park system by the public" (R.77).

The City retained the care, management, and custody of the Amphitheatre and all its equipment and appurtenances (R. 78). No new structure could be erected, no work begun to replace, maintain or repair equipment, appurtenances or physical property connected with the Amphitheatre except on the joint decision of the City and respondent (R. 76).

The City agreed to furnish water (R.76) and to provide roads, paths and parking areas necessary to accommodate persons desiring to attend entertainment given under respondent's auspices (R. 77). The City reserved the right to make and enforce reasonable rules and regulations, to insure good order, to prohibit any entertainment indecent, immoral or calculated to create racial or religious antagonism or to disturb the public peace (R. 79).

The City retained the right to authorize the use of the Amphitheatre for any purpose not inconsistent with rights conferred upon respondent (R. 78). However, the City agreed not to permit any other party to use the Amphitheatre between May 1 and September 30 for the purpose of presenting entertainment at which an admission fee is charged or from which monetary profit is expected unless such party first sought to sublease the Amphitheatre from respondent and the latter arbitrarily refused (R. 78). Finally, the City retained the right to unilaterally terminate the agreement if it deemed it not in the best interest of the public (R. 79).

On September 30, 1951, after the filing of the trial court's memorandum opinion but before entry of judgment, the agreement then in effect between the City and

respondent expired. A new agreement was entered which is set forth in Appendix A. While this agreement was for the year 1952, it has now been renewed for the year 1953. This agreement for the first time sets forth the City's desire to have "similar organizations use the facilities of Iroquois Amphitheatre." Respondent is granted the exclusive right to use the Amphitheatre between June 14 and August 23. The City expressly agrees that it will not give permission to any other party to use the Amphitheatre during the above period without first obtaining the written consent of respondent. Moreover, this agreement, unlike its predecessors, does not reserve to the City the right to overrule an arbitrary refusal to sublease on the part of respondent. Further, the present lease requires the payment by respondent of a rental fee of $1000. In most other respects, the present agreement is the same as the prior agreements.

Specifications of Error

The court erred:

1. In refusing to hold that respondent was operating for and on behalf of the Department of Parks and Recreation of the City of Louisville.

2. In refusing to hold that respondent, as lessee of the City of Louisville, was subject to the same limitations and restrictions as the City itself with respect to its power to deny admission or exclude persons solely on the basis of race and color.

3. In refusing to hold that petitioner had been denied the equal protection of the laws by respondent's refusal to admit him to a city owned structure located in a public park.

Reasons For Allowance of the Writ

1. This case seriously affects the right of Negro citizens to enjoy the benefits of publicly-owned recreational facilities.

Public recreation has come to play an important role in 20th century America.[1] Recognition of the importance of recreation to the maintenance of strong democratic institutions has come only within the past thirty to forty years.[2] It is now understood that effective recreational outlets are essential to the proper functioning of many of the important aspects of modern living. Appropriate recreation is now considered an essential factor in the development of sound mental and physical health,[3] a necessary aid to the building of good morale in the armed services,[4] and an effective preventive to juvenile delinquency.[5]

The public has now accepted the notion that recreation is properly a governmental function [6] since only if the state assumes some obligation in this field can there be any assurance that needed recreational facilities will be available to the large mass of our population.[7] A recent survey lists

---

[1] See Recreation, *Encyclopedia of Social Sciences* 176 (1934); Dulles, *America Learns to Play* (1940); Steiner, *Americans at Play* (1933).

[2] Neumeyer, *Leisure and Recreation* 1-72 (1936). For a statistical survey, see National Recreation Association, *Recreation and Park Year Book* (Mid-century edition 1951).

[3] Gardner, Recreation's Part in Mental Health, 45 *Recreation* 446 (1952); Slavson, *Recreation and the Total Personality*, Ch. 1-2 (1946).

[4] The Thirty-third National Recreation Congress—in Review, 45 *Recreation* 370 (1951).

[5] Rogers, *The Child at Play* 34-36, 192 (1932).

[6] Hjelte, *The Administration of Public Recreation* 24 (1940).

[7] Institute for Training in Municipal Administration, *Municipal Recreation Administration* 30 (1945).

36 different types of recreational facilities commonly operated by municipalities.[8] There are alone 217 publicly-owned outdoor theatres and 504 publicly-owned stadiums reported.[9]

With the increase in governmental operations in this area, securing equal recreational opportunities for Negroes without discrimination on account of race or color, as in other phases of governmental activity, has become a problem which courts have been called upon to resolve.[10] Courts have had little difficulty in bringing recreational facilities within the reach of the Fourteenth Amendment where they have been operated exclusively and openly by the state.[11] Confusion as to the application of constitutional principles, however, has arisen where the public recreational facility was operated pursuant to an agreement between the state and a private agency, e.g., the leasing arrangement in the

---

[8] National Recreation Association, *Recreation and Park Year Book* (Mid-century edition, 1951).

[9] *Ibid.*

[10] See *Rice* v. *Arnold*, 340 U. S. 848, vacating 45 So. 2d 195 (Fla. 1950), reaffirmed 54 So. 2d 114 (Fla. 1951), cert. denied 342 U. S. 896; *Beal* v. *Holcombe*, 193 F. 2d 384 (C. A. 5th 1951); *Boyer* v. *Garrett*, 183 F. 2d 582 (C. A. 4th 1950), cert. denied 340 U. S. 912; *Harris* v. *City of Daytona Beach*, 105 F. Supp. 572 (S. D. Fla. 1952); *Camp* v. *Recreation Board for the District of Columbia*, 104 F. Supp. 10 (D. C. 1952); *Williams* v. *Kansas City*, 104 F. Supp. 848 (W. D. Mo. 1952), appeal pending; *Draper* v. *City of St. Louis*, 92 F. Supp. 546 (E. D. Mo. 1950), appeal dismissed 186 F. 2d 307 (C. A. 8th, 1950); *Law* v. *Mayor and City Council of Baltimore*, 78 F. Supp. 346 (Md. 1948); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S. D. W. Va. 1948); *Lopez* v. *Seccombe*, 71 F. Supp. 769 (S. D. Cal. 1944); *Kern* v. *City Commissioners*, 151 Kan. 565, 100 P. 2d 709 (1940); *Durkee* v. *Murphy*, 181 Md. 259, 29 A. 2d 253 (1942); *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 (1948).

[11] See *Law* v. *Mayor and City Council of Baltimore, supra; Beal* v. *Holcombe, supra.*

instant case. The arrangement here involved is not an isolated or singular case but a common feature in this field. A 1939 survey revealed that 128 governmental agencies reported that they had leased certain facilities on a commercial basis.[12] Thirty out of 156 such agencies reporting leased one or more facilities to a private club or association on a non-commercial basis.[13]

The decision of the Court of Appeals will thus have ramifications far beyond the narrow facts of the instant case. In the light of this case the constitutional right of Negroes and other minority groups to receive the services of all presently leased municipal recreational facilities without discrimination becomes questionable. If the view of the court below is correct, Negroes may now be effectively excluded from given public recreational facilities by a simple leasing device. Indeed, the same stratagem can be used not only in the case of recreational facilities, but with respect to all types of governmental property.[14]

It is vital for this Court to grant certiorari in this case in order to determine the extent to which the operation of a public recreational facility under a leasing arrangement with a private organization is subject to constitutional limitations. Only in this way can Negro citizens be assured of protection in obtaining the benefits of public recreational facilities on the basis of equality required by the Fourteenth Amendment.

---

[12] National Park Service, U. S. Dept. of Interior, *Fees and Charges for Public Recreation*, 20-21, 29 (1939).

[13] *Ibid.*

[14] Compare *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E. D. Va. 1949), with *Norris* v. *Mayor & City Council of Baltimore*, 78 F. Supp. 451 (Md. 1948).

2. Whether the respondent's operations in this case constitute state action presents a substantial federal question which should be independently determined by this Court.

The stipulations of fact and the terms of the leasing agreements which provide the predicate of the decision in this case establish a picture of state ownership and control. The Department of Public Parks conceived of the construction of Iroquois Amphitheatre as a means of increasing the use and enjoyment of its public park system (R. 62-63). It was able to secure all but $5,000 of the necessary funds from the United States Works Progress Administration (R. 63). Respondent, which was organized to enable the general public to enjoy musical and dramatic entertainment, agreed to assist the City in procuring the necessary $5,000 to construct the Amphitheatre and undertook to present entertainment at the Amphitheatre. Thus, from the very inception of this relationship respondent acted as the chosen instrument of the City.

Under the lease in force when this cause arose respondent had exclusive use of the Amphitheatre from May 1-September 30 (R. 18, 74-75)—the entire period of its usefulness for open air presentation. Respondent paid no rent, and was required to pay all net profits over to the City (R. 78). It had but a qualified right to set admission prices (R. 75-76). Moreover, just as any other self-sustaining governmental agency, respondent was required to submit an annual report of its operations, including an audited financial statement (R. 77), and to conduct its activities for the benefit of the public (R. 75, 76, 77).

The City, on its part, retained the care, management and custody of the structure. Yet the City could make no repairs or replacements of any structure or equipment except upon the joint decision of both parties (R. 76) and retained only a qualified right to sublease (R. 78). Finally, the City re-

served the right to unilaterally terminate the agreement (R. 79).

These factors, we submit, show clearly that respondent was acting for and under the supervision and control of the Department of Public Parks. Indeed, respondent here was merely aiding the City in accomplishing one of its objectives.

The present lease requires the respondent to pay a modest rental fee of $1000,[15] and does not require the submission of an annual financial statement.

Respondent is granted exclusive use for a somewhat shorter season (June 14 through August 23),[16] but the dates pre-empted are those most favorable for presentation of outdoor cultural entertainment. Furthermore, this is the traditional outdoor musical season.[17]

The City can now sublease to others only with respondent's written consent. It may no longer overrule respondent's arbitrary refusal to sublet. The duty to keep and maintain the structure in good repair is placed upon respondent. Other than style, the current agreement is identical in all major respects with the one detailed above.

---

[15] Payment of rental is not a crucial indication of private action. See *Culver* v. *City of Warren, supra,* note 10; *Kern* v. *City Commissioners, supra,* note 10.

[16] This merely conforms more realistically to the period when respondent actually presented productions in the outdoor theatre in previous years (R. 19): July 1-August 10, inclusive, 1947; July 5-August 14, inclusive, 1948; July 11-August 21, inclusive, 1949; July 10-August 6, inclusive, 1950 and July 6-August 19, inclusive, 1951. These dates do not include periods when respondent used the premises for rehearsals, etc.

[17] Hewitt, A Backward Glance at '49, 35 *Equity* 11 (April, 1950); Hewitt, The Survey of Summer Stock, 34 *Equity* 13 (April, 1949).

Thus, in our view, under the present agreement respondent remains an instrument of the state in its operation of the Iroquois Amphitheatre. The words of the court in *Lawrence* v. *Hancock*, 76 F. Supp. 1004, 1008 (S. D. W. Va. 1948), seem particularly appropriate to describe this relationship:

> "Justice would be blind indeed if she failed to detect the real purpose in this effort of the City * * * to clothe a public function with the mantle of private responsibility. 'The voice is Jacob's voice,' even though 'the hands are the hands of Esau.' It is clearly but another in the long series of stratagems which governing bodies of many white communities have employed in attempting to deprive the Negro of his constitutional birthright; the equal protection of the laws."

Moreover, it is equally clear under Kentucky law that the City is required to control the operation of the Amphitheatre. This duty is imposed upon the Director of the Department of Parks and Recreation and cannot be delegated. *Park Commissioners of Ashland* v. *Shanklin*, 304 Ky. 43, 199 S. W. 2d 721 (1947). In *Board of Park Commissioners* v. *Speed*, 215 Ky. 319, 285 S. W. 212 (1926), the court enjoined the Board of Park Commissioners of Louisville from entering into a contract with the Louisville Memorial Commission whereby the latter was to be given the power to erect and manage an auditorium on public park property. In so holding, the Court declared at page 333:

> "If an auditorium is to be erected and maintained upon park property, it must be under the control of the park board since the board has been designated by law, and its members elected by popular choice, to manage and control that property."

More recently, in the *Shanklin* case, the Court of Appeals of Kentucky reiterated this view in saying at page 47:

> "It seems to us that the proposed contracts would in effect give to the various clubs the right and power to exclude the general public from the use of a substantial part of the park for an indefinite although substantial period of time. This would be consistent with its free public use. The Board would surrender its sole and exclusive control of the management of this part of the public property. Its dominion and administration would be less than absolute."

The decisions here is at war with these state authorities. Since under Kentucky law, respondent can only act for and through the Department of Public Parks, its action in the instant case is bound by the requirements of the Fourteenth Amendment.

In holding to the contrary, the court below committed fundamental error. Determination as to whether respondent's action is private or state in character presents a substantial federal question which this Court should determine for itself. *Nixon* v. *Condon*, 286 U. S. 73, 88-89. For these reasons, we respectfully submit, this petition should be granted.

3. Decisions among state and lower federal courts with respect to the status of leasing arrangements between municipalities and private organizations are in conflict and should be resolved.

The central constitutional problem here presented is to distinguish private action from public action. The Fourteenth Amendment has foreclosed, at least as a constitutional issue, discriminatory action by public authority. The difficulty in thinking of any private rights independent

of recognition and protection by government indicates that "public" and "private" are not separate compartments but titles for opposing ends of a continuous spectrum.[18] This Court has already faced the problem of isolating unconstitutional public discrimination in the primary cases, *Terry* v. *Adams*, — U. S. —, 21 U. S. L. Week 4346 (May 4, 1953); *Smith* v. *Allwright*, 321 U. S. 649; *United States* v. *Classic*, 313 U. S. 299; *Nixon* v. *Condon*, 286 U. S. 73; *Grovey* v. *Townsend*, 295 U. S. 45; *Nixon* v. *Herndon*, 263 U. S. 536; see *Rice* v. *Elmore*, 165 F. 2d 387 (C. A. 4th 1947), cert. denied 333 U. S. 875; the restrictive covenant cases, *Shelley* v. *Kraemer*, 334 U. S. 1; and the railway labor cases, *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Fireman*, 323 U. S. 210. The Fourth Circuit was also faced with the same problem in *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (C. A. 4th 1945), cert. denied 326 U. S. 721. In petitioner's opinion, the court below in the instant case has misconceived the thrust of these decisions and thus ignores the pith of the matter here involved.

In the absence of a definitive decision by this Court, considerable confusion exists among lower federal and state appellate courts as to where to draw the line between "public" and "private" action where a public agency owns and a private organization operates a recreational facility pursuant to a leasing arrangement. Compare *Lawrence* v. *Hancock, supra*, with the instant case; *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 (1948), and *Kern* v. *City Commissioners*, 151 Kans. 565, 100 P. 2d 709 (1940) with *Harris* v. *City of St. Louis*, 233 Mo. App. 911, 111 S. W. 2d 995 (1938) and *Modern Amusements, Inc.* v. *New Orleans Public Service*, 183 La. 848, 165 So. 137 (1935).

---

[18] Barnett, What is State Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?, 24 *Ore L. Rev.* 227, 229-30 (1945).

Since doctrinally the discriminatory action has to be that of the state in order to bring the broad constitutional prohibition into play, the question which arises here is what circumstances are to be deemed sufficient to give rise to state action. In *Lawrence* v. *Hancock, supra,* there was involved a lease of a city owned and constructed swimming pool to a private corporation which paid no rent, received no profits and had to maintain the facility. The court held that the lessee's exclusion of Negroes was unconstitutional state action. The *Kern* and *Culver* cases, *supra,* also involving publicly-owned swimming pools, both held that the leasing arrangement did not divest the facilities of their public characteristics. In the former case, the lease established the hours when the pool was to be operated, set the admissions charges, and required the lessee to pay an annual rental of $1,000. In the latter case, the contract required the City to maintain the pool and the lessee to pay over 10% of the gross profits as rent.

Contrary holdings, however, resulted in the *Harris* and *Modern Amusements* cases, *supra.* In the *Harris* case, a municipal auditorium and community center was leased to various private groups. Negroes, however, were restricted to a segregated section in the balcony by one private lessor who almost exclusively pre-empted the use of the auditorium for a series of musical and dramatic presentations. The City reserved the right of revocation, control, management, and the power to establish charges and enforce all necessary rules for the operation of the facility. The court held that the City had a legal right to let the facility and permit the lessee to regulate the admission policy because the City, in such instance, acts not in its governmental capacity but rather in a quasi-private capacity free of constitutional limitations.

The *Modern Amusements* case developed out of a lease of a city-owned stadium to a private corporation under an agreement whereby the lessee covenanted not to operate it

in an objectionable or offensive manner. When the City terminated the lease after the lessee permitted a game between Negro teams to be played on the premises and the lessee sought to recover for breach of the lease on the ground that the City's action constituted unconstitutional racial discrimination, the court ruled that the agreement was a private contract to which the Fourteenth Amendment did not extend.

In the instant case, the decisions below were bottomed on the *Harris* case, *supra*. While cognizance was apparently taken of the indicia of state action surrounding the construction of the Amphitheatre and reserved in the leasing contracts, crucial weight was placed upon the fact that respondent is a private association which assumed all financial risks arising incidental to its use of the facility. Thus, the court held that respondent was not a governmental agency and could discriminate against petitioner without constitutional restriction.

In sum, the courts which have regarded leasing agreements as mere private contracts entered into by city governments in their quasi-proprietary capacity have upheld the racial discriminatory policies and practices of private lessees. On the other hand, those courts which have stressed the public dedication of the leased premises, the vestiture of ownership, and the various indicia of governmental control retained in the agreement, have viewed lessees as governmental instrumentalities managing the leased premises under a contract entered into by municipalities in their trusteeship capacity. Therefore, petitioner urges this Court to grant certiorari in order to resolve this conflict and set appropriate standards by which lower courts should be guided in this area.

4. The decision below is in conflict with principles established in decisions of this Court, particularly *Nixon* v. *Herndon.*

While petitioner was refused admission to Iroquois Amphitheater by respondent because of his race and color (R. 19), respondent in fact did not have the power to freely determine its own admission policy. The Amphitheatre is located in a park which the Department of Parks and Recreation has set aside for the exclusive use of white persons (R. 44). The authority of the City to promulgate rules and regulations assigning certain parks exclusively to Negroes and others to white persons was sustained by the Court of Appeals of Kentucky in *Warley* v. *Board of Park Commissioners,* 233 Ky. 688, 26 S. W. 2d 554 (1930). It is admitted that Negroes were denied admission to parks set aside for the exclusive use of white citizens solely on account of their race (R. 43). To view respondent's action, therefore, as the independent action of a private person, as did the court below, is to distort facts.

Petitioner was in truth denied admission to the Iroquois Amphitheatre pursuant to state regulations and in conformity to state law. Under the City's rules only white persons were entitled to use Iroquois Park. Thus petitioner, in going into the Park in his attempt to attend the performance at the Amphitheatre, actually violated the City's regulations. In the absence of state law, respondent had no authority or power to refuse admission to any law-abiding citizen who tendered the requisite admission fee. See *Park Commissioners of Ashland* v. *Shanklin, supra; Board of Park Commissioners* v. *Speed, supra.*

Indeed, it would seem clear that had respondent arbitrarily refused admission to a white person, it would have breached the agreement between it and the City, for the entire purpose of the agreement as expressed therein is to

bring about an increased use of Iroquois Park by making entertainment at the Amphitheatre available to the public at low cost (R. 75, 76, 77). An affirmative duty is thus placed on respondent to admit all white members of the public. And it is only by virtue of the City's regulations and state court decisions upholding the City's right to maintain segregated parks that respondent had the authority to deny petitioner admission to the Amphitheatre. *Cf. Public Utilities Commission of the District of Columbia* v. *Pollack,* 343 U. S. 451.

Since respondent here was in fact enforcing state law, it was the state's regulations which prevented petitioner's admission. To this extent respondent was acting for the state and under color of state law, and its action is therefore subject to the restraints of the Fourteenth Amendment under principles enunciated by this Court in *Nixon* v. *Herndon, supra.* See also *Nash* v. *Air Terminal Services, supra.*

The Fourteenth Amendment imposes a duty on the City to make public park property available to all persons without discrimination based upon race and color. Since the Amphitheatre was a unique piece of public property, exclusion therefrom of Negroes pursuant to state authority was clearly an unconstitutional act. See *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637.

It is clear that the Department of Public Parks could not present entertainment at the Amphitheatre under its exclusive auspices and deny petitioner's admission. Nor, we submit, can the requirements of the 14th Amendment be avoided by leasing the site to respondent subject to City regulations limiting use of the park to white persons.

The decision of the court below in holding respondent's action to be private action free of constitutional limitations

is in fatal conflict with principles settled by this Court in *Nixon* v. *Herndon, supra.* We respectfully submit that this Court grant this petition in order that this conflict be resolved.

5. The decision in this case is in conflict with the principles enunciated by this Court in *Nixon* v. *Condon, Smith* v. *Allright* and *Terry* v. *Adams* with respect to the delegation of state authority.

Under applicable Kentucky statutes, the title to Iroquois Amphitheatre is held by the City, "in strict and inviolable trust" for public park purposes.[19] The Department of Public Parks and Recreation is entrusted with the care, management, and custody of all park grounds used for park purposes.[20] *Board of Park Commissioners of Ashland* v. *Shanklin, supra; Board of Park Commissioners* v. *Speed, supra.*

The record reveals that the City here looked upon the arrangement not as a lease of property held in its quasi-proprietary capacity, cf. *Harris* v. *City of St. Louis, supra,* but as a method of carrying out its statutory duty to manage the City parks for the public good. The agreements between the City and respondent highlight this intention. The first agreement of lease, entered into just prior to the construction of the Amphitheatre, recites that the Park Board of the City of Louisville is of the opinion that "the construction of an outdoor amphitheatre, suitable for the production of musical, dramatic, operatic, and other forms of entertainment, out-of-doors, in Iroquois Park, would greatly increase the recreational facilities available to the

---

[19] Ky. Rev. Stat., § 97.252 (1948). See Appendix B. *Cf. Hague* v. *Congress of Industrial Organization,* 307 U. S. 496, 514.

[20] Ky. Rev. Stat. § 97.290 (Baldwin's certified ed., 1942) as incorporated into Ky. Rev. Stat., § 97.250 (1948). See Appendix B.

public in said Park, and the use and enjoyment of said Park by the Public * * *" (R. 62-63). All agreements require that admission fees and charges be reasonable so as to "increase the use of Iroquois Park by making the entertainment presented at said Amphitheatre available to the public at low cost" (R. 66, 75-76, App. B). These provisions thus manifest the intention of the City to transfer to respondent the performance of a governmental function.

In *Nixon* v. *Condon, Smith* v. *Allright* and *Terry* v. *Adams,* this Court was faced with instances of delegation of a governmental function fundamentally similar to that in the instant case. In *Nixon* v. *Condon,* a state statute granted to the executive committee of each political party the power to prescribe the qualifications of its members. This Court held that the refusal of the election judges to permit petitioner to vote in a primary election was violative of his rights under the Fourteenth Amendment, because "[d]elegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black." at page 89. A strict principal-agency test in the determination of state action was there expressly rejected.

While the delegation of state authority in *Smith* v. *Allright* was not as clear-cut, this Court found such delegation in "the duties imposed upon [the party] by state statutes." More recently, in *Terry* v. *Adams* where the picture was even more blurred,[21] again this Court found state action. Mr. Justice Clark, concurring, speaking for three other members of this Court, expressed the guiding principle succinctly in these words:

> "Accordingly, when a state structures its electoral apparatus in a form which devolves upon a

[21] See *Rice* v. *Elmore, supra; Baskin* v. *Brown,* 174 F. 2d 391 (C. A. 4th 1949).

> political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play." — U. S. —, 21 U. S. L. Week at 4351.

The principal-agency test for determining state action was again repudiated, Mr. Justice Black stating:

> "It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage." — U. S. —, 21 U. S. L. Week at 4349.

The decisions in the above cases are of course limited to the field of primary elections. But the general principles involved cannot be so narrowly restricted, for the philosophy of state action upon which these decisions rest is an all-pervasive one. If the state allows the performance of a governmental function to devolve upon a private organization, that organization assumes those attributes of government which bring the constitutional safeguards into play.

Indeed, state and lower federal courts have almost invariably held that the principles underlying *Nixon* v. *Condon* and *Smith* v. *Allright* are ones of general validity and thus applicable to other areas of governmental activity. *Kerr* v. *Enoch Pratt Free Library, supra* (library); *Nash* v. *Air Terminal Services, supra* (restaurant); *Lawrence* v. *Hancock, supra; Kern* v. *City Commissioners, supra; Culver* v. *City of Warren, supra* (swimming pool). See *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541 (1949), cert. denied 339 U. S. 981.[22] But *cf. Harris* v. *City*

[22] The New York Court of Appeals there stated, at page 532:
"In a more recent series of cases, the federal courts have held private groups subject to the constitutional restraints when they perform functions of a governmental character in matters of great public interest."

of St. Louis, supra; Modern Amusements Inc. v. *New Orleans Public Service, supra.*

In the *Kerr* case, the Court of Appeals for the Fourth Circuit, expressly refusing to be guided by technical principles of principal and agent, gave forceful recognition to the proposition that the principles of *Nixon* v. *Condon* and *Smith* v. *Allright* are applicable to any grant of state power to a private organization for the performance of a state function.

While the *Nash* case involves federal action rather than state action, it is particularly illuminating. The defendant there operated restaurants at Washington National Airport as a concessionaire of the United States Government. In holding that defendant was under a constitutional duty to serve all persons without discrimination on account of race or color, the court based its decision solely on the fact that defendant had been granted authority to perform a governmental function. The heart of the court's decision is stated in these words at page 549:

> "In effect, the concessionaire here is conducting the facility in the place and stead of the Federal government. To conclude otherwise would overlook not only the status and purpose of the airport, but also the purpose of the concession. It is to provide food and refreshment to the public in travel and to complement the facilities offered by the United States Government in support of air transportation * * * we * * * hold its restaurants are too close, in origin and purpose, to the functions of the public government to allow them the right to refuse service without good cause."

The decision in the instant case departs from the generally prevailing view. The basic conflict between the decision below and the above cases makes this case one pecu-

liarly appropriate for review by this Court. In deciding that the acts of respondent did not constitute state action, the court below, in effect, reverted to traditional principles of agency law as the single standard—a test rejected by this Court in the primary election cases and generally abandoned by other courts in other areas of governmental activity.

The factual differences between the primary election cases and the instant one should not be allowed to blur the fundamental oneness of the problems involved. Of course, there is hardly any duty on a municipality to acquire land for park purposes or to invest public funds in the construction of a public amphitheatre thereon. Nevertheless, once the City of Louisville here acquired Iroquois Park and constructed the Amphitheatre, there developed upon the Director of Parks and Recreation the statutory duty to manage the Amphitheatre for public park purposes. Thus, the delegation of governmental authority here is of the same nature as that in *Nixon* v. *Condon*, *Smith* v. *Allright*, and *Terry* v. *Adams*.

It is respectfully submitted that this Court grant this petition in order to resolve the conflict between the decision below and the principles enunciated by this Court in the primary election cases.

6. The decision of the Court below conflicts with well-settled doctrine of this Court that rights guaranteed under the 14th Amendment are personal and present.

The district court placed considerable emphasis upon the fact that neither petitioner nor any organization to which he belonged had sought to secure possession of the Amphitheatre for the purpose of providing entertainment procured and paid for by them without expense to the City. What the court was in effect stating is that if a sufficient number of Negroes were interested in supporting the pro-

duction of musical entertainment, then the City would be obliged to allow them to use the Amphitheatre when it wasn't being used by respondent. Thus it conditions petitioners' right to enjoy the recreational benefits available to white persons at the Iriquois Amphitheatre on what may or may not be done by other members of petitioner's racial group.

This Court has often reiterated that rights secured under the 14th Amendment are personal and present and cannot be made dependent on what course of action other persons may take. See *Sweatt* v. *Painter*, 339, U. S. 629; *Shelley* v. *Kraemer*, 334 U. S. 1; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151. In basing its decision on the fact that there had been no showing that any Negro group or organization had applied for permission to use the Amphitheatre and had been refused, the court below applied principles in basic conflict with a well-settled constitutional doctrine of this Court and committed fatal error.

CONCLUSION

WHEREFORE, for the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. CARTER,
THURGOOD MARSHALL,
BENJAMIN F. SHOBE,
Counsel for Petitioner.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
of Counsel.

Dated: May 20, 1953.

APPENDIX A

Agreement

This AGREEMENT made and entered into this 5th day of February, 1952, by and between the Department of Parks and Recreation of the City of Louisville, Kentucky by its Director, T. Byrne Morgan (hereinafter called the Department), and Louisville Park Theatrical Association (hereinafter called The Association), a corporation having no capital stock and from whose operations no private pecuniary profit is derived,

Witnesseth That

WHEREAS, the purpose of the Association is to present musical and theatrical entertainment in the City of Louisville at low cost and,

WHEREAS, The Department owns a structure, located in Iroquois Park, known as Iroquois Amphitheatre which has facilities suitable for use in presenting musical and theatrical entertainment, and

WHEREAS, The Association is desirous of using such facilities for the presentation of its musical and theatrical entertainments and The Department is desirous of having The Association and other similar organizations use the facilities of Iroquois Amphitheatre,

NOW, THEREFORE, in consideration of the premises and of the covenants and agreements hereinafter set out, the said parties do hereby covenant and agree as follows:

1. The Department in consideration of the agreements and covenants of the Association as hereinafter set out, does hereby give and grant to the Association the exclusive

right and privilege to use said Iroquois Amphitheatre, together with the equipment, buildings and land appurtenant thereto, on such dates between June 14, 1952, and August 23, 1952, as The Association may, by written notice to the Department, designate; and agrees that it will not lease, or give to any other person, firm or corporation the right to use said Amphitheatre during said period, without having first obtained the written consent of The Association thereto.

2. The Association shall have the right to use the Amphitheatre on any, or all, of said dates, for the purposes of rehearsing, and/or presenting, such musical, dramatic, operatic, and other forms of entertainment, both amateur and professional, as it may select; for the sale and service on such occasions of such food, soft drinks, tobacco, cigars, cigarettes, candy, programs, musical scores, etc., as are customarily sold or offered for sale in similar places of public entertainment and for the rendition of such other services as are customarily rendered in such places, and for no other purpose.

The Association shall have the right to produce the entertainment, sell and serve the items, and render the services aforesaid, itself, or to contract with any other person, firm, or corporation, for the production of said entertainments, the sale and service of said items, and the rendition of said services or any of them.

3. The Association, or any person, firm or corporation with whom The Association has contracted for the production of any entertainment at said Amphitheatre, shall have the right to charge any person seeking to attend said entertainment such admission fee as may be fixed by the Board of Directors of the Association. Likewise, The Association, or any person, firm or corporation with whom it has contracted to furnish food, soft drinks, programs,

musical scores, etc., or to render said services as are customarily rendered in connection with such entertainment, shall have the right to charge such prices as may be approved by the Board of Directors of The Association. Provided, however, that such admission fees and charges shall be reasonable and consistent with the desire of both parties thereto to increase the use of Iroquois Amphitheatre by making the entertainment presented at said Amphitheatre available at low cost.

4. The Association agrees that it will not erect, or maintain, any signs or advertisements, in, upon, or about the Amphitheatre, except only such signs or advertisements, as may with the approval of the Department be placed thereon to advertise attractions to be presented at said Amphitheatre, and as are contained in programs distributed at any performance given in said Amphitheatre, and agrees that the Department may remove, or obliterate, any sign, or advertisement, erected or maintained by the Association in violation of the Agreement.

5. The Department agrees that:

(a) It will turn over said Amphitheatre to The Association, on June 14, 1952, in good order and repair and in suitable condition for use by The Association;

(b) Furnish all water necessary to enable The Association, or any person, firm or corporation with whom The Association may have contracted, to produce the entertainment contemplated by this Agreement. The Association is to pay all other utility bills during the period of its use (June 14, 1952 to and including August 23, 1952) of said Amphitheatre.

6. The Association agrees to pay to the Department on or before August 23, 1952, the sum of One Thousand ($1,000.00) Dollars for the rights and privileges granted

to it by this Agreement in connection with the use of said Amphitheatre, to re-imburse the Department for additional expenses occasioned by this use.

7. The Association agrees that during the period of its use of said Amphitheatre it will keep said premises in good order and repair and at the expiration of its term of use will return said premises to the Department in as good condition as reasonable and careful use will permit.

8. The Association shall have the exclusive right to select, and agrees to assume full responsibility for employing, fixing and the compensation of, and paying the salaries and wages of, all artists, actors, musicians, ticket takers, ushers, stage hands, and persons other than police, employed in connection with the presentation of any entertainment produced by, or under the auspices of, The Association at said Amphitheatre.

9. The Association agrees that The Department shall at all times have the right to make and enforce such reasonable rules and regulations as it deems necessary for the preservation of said Amphitheatre and the equipment and appurtenances thereto belonging, and for the preservation of good order therein, and shall have the right to prohibit the production at said Amphitheatre of any entertainment which is, in the opinion of The Department or any other department, indecent or immoral or calculated to create or incite racial or religious antagonism or disturbance of the public peace.

10. It is further mutually understood and agreed by and between the parties hereto that The Association shall have the right, at its option, to renew this Agreement on the same terms and conditions and for the same or similar period of time for the use of said Amphitheatre for the

Summer season of 1953. The Association must notify, in writing, The Department of its election to renew the said Agreement on or before October 1, 1952.

IN TESTIMONY WHEREOF, the parties have caused their corporate names to be subscribed and their corporate seals to be affixed hereto, The Department of Parks and Recreation, by its Director, and the Louisville Park Theatrical Association by its President, all at Louisville, Kentucky, the day and year first above mentioned.

THE CITY OF LOUISVILLE

By T. Byrne Morgan
Director of Parks and Recreation

LOUISVILLE PARK THEATRICAL ASSOCIATION

By: G. E. Gans

(Seal of City of Louisville)

Approved
Charles P. Farnsley
Mayor

I, Wm. D. Meyers, Director of Finance of the City of Louisville, Kentucky, and by virtue of Kentucky Revised Statutes Section 91.060, custodian of ordinances and records of the City of Louisville do hereby certify that the foregoing is a full and true copy of an agreement of the City of Louisville entered into the 5th day of February, 1952.

Wm. D. Myers

APPENDIX B

Statutes of Kentucky

Applicable to Parks in Cities of the First-Class

KENTUCKY REVISED STATUTES (1948)

97.250 [2840; 2841; 2844; 2847] **Powers of department of public parks and recreation in first-class cities; employes; director of parks and recreation.** (1) The department of public parks and recreation of any city of the first class shall, from and after the effective date of KRS 97.250 to 97.258, be vested with and exercise all of the powers and perform all of the functions and duties of any then existing board of park commissioners of such city, except as may be otherwise provided by law or by KRS 97.250 to 97.258. From and after said date any such board of park commissioners of such city shall cease to exist. The agents and employes of said department of public parks and recreation, except as provided herein, shall be employed and governed in accordance with the merit system, as provided by any law or laws, or amendments thereof, and any rules and regulations issued pursuant thereto, authorizing, creating and governing any city board or commission empowered to administer and enforce civil service laws, rules and regulations in and for such city.

(2) *The department of public parks and recreation of any city of the first class shall be under the supervision and direction of a director to be designated director of parks and recreation, and shall have exclusive direction, supervision and control of all park property, as herein defined,* except as otherwise provided by law or by KRS 97.250 to 97.258 or by ordinance of the legislative body of said city; and shall provide for and supervise all public amusements and recreation in parks, playgrounds, and community cen-

ters. The director of said department shall have power to adopt rules and regulations for the reasonable and proper use, management and control of public park, playground and community center property, and may organize the said department for administrative purposes into such divisions as may be necessary for the proper conduct of the business of said department, and appoint heads or chiefs of such divisions, who, under the supervision and control of said director, shall have the direction of such divisions. (1942, c. 34, § 2) [Emphasis supplied.]

97.251 Definition of "park property." The term "park property" includes all parks, squares and areas of land owned or used by said city for park purposes, and all buildings, structures, improvements, seats, benches, fountains, walks, drives, roads, trees, plants, herbage, flowers, and other things thereon, and inclosures of the same; all shade trees on streets or thoroughfares throughout park property and said city; all resting places, watering stations, playgrounds, parade grounds, community centers, or the like; all connecting parkways and roads or drives between parks, and all avenues, roads, ways, drives, walks, with all trees, shrubbery, vines, flowers and ornaments of any description thereon, acquired for park purposes; and all birds, animals or curiosities, or objects of interest or instruction placed in or on any of such inclosures, ways, parkways, roads or places; and said term shall be liberally construed. (1942, c. 34, § 2)

97.252 Title to and control of park property; exemption from taxation; use for streets; contracts for use of aviation fields; control of public ways acquired for park purposes. (1) The title to all property with all improvements and equipment acquired for park, airport or aviation field purposes, owned by the board of park commissioners of a city of the first class at the time KRS 97.250 to 97.258 become effective, is hereby transferred to the city subject to any

existing leases thereof, *and shall be held by the city in strict and inviolable trust for such public purposes,* free from all taxation, imposts or assessments by state, county, district, municipal, or other governmental subdivision; provided, however, that the city may use any portion of such property as may be necessary and proper for the construction, extension, or widening of streets, boulevards, thoroughfares or other public ways, and may enter into contracts or agreements, with reference to properties acquired for airport or aviation field purposes, for the use of such field and airport for aviation purposes, with the United States government or any agency thereof, or any state government or any agency thereof, or any board of aviation established under any Act of the General Assembly of this Commonwealth, or of any other commonwealth or state, or any individual, firm or corporation; provided, however, it shall at no time and in no way enter into any contract or agreement that prevents its carrying out the main purpose of the establishment and maintenance of a public municipal aviation field and airport, for the general use of the citizens of said city as a park purpose. [Emphasis supplied.]

(2) Such park property as consists of all connecting parkways and roads or drives between public parks, and all avenues, roads, ways, drives and walks outside of the boundaries of public parks, which were or are acquired for park purposes, from and after the effective date of KRS 97.250 to 97.258, shall be under the direction, control, maintenance and management of the department of public works of said city. (1942, c. 34, § 2)

Pertinent Prior Statutes

KENTUCKY REVISED STATUTES
(1942 Baldwin's Certified Edition)

97.270 Powers and duties of board of park commissioners in first class cities. (1) The board shall have the care, management and custody of all parks and grounds used for park purposes. . . .

• • •

CARROLL'S KENTUCKY STATUTES ANNOTATED
(Bald. Rev. 1936 ed.)

§ 2840. Board of park commissioners; controlled by.—The public parks in a city of the first class shall be held, managed and controlled by a board under the name and style of the board of park commissioners.

• • •

§ 2848. Powers and duties of commissioners.—The board, constituted as aforesaid, shall have the care, management and custody of all parks and grounds used for park purposes. . . .

• • •

Office - Supreme Court
FILED
JUL 2 1951

24

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2–5
Argument	5–13
I. Title 28, United States Code, Section 1251(1), Under Which Petitioner Invokes the Jurisdiction of this Court, Relates Solely to the Original and Exclusive Jurisdiction of this Court	5–6
II. The Lease Agreement Upon Which Petitioner Bases His Entire Argument Has Terminated and the Question Involved Based Thereon is Moot	6–8
III. Response to Reasons Assigned by Petitioner for Allowance of the Writ	8–13
Conclusion	13

TABLE OF CASES CITED.

	PAGE
Amalgamated Association of Employees v. Relations Board, 340 U. S. 416	8
Board of Park Commissioners v. Speed, 215 Ky. 319, 285 S. W. 212	9
Culver v. City of Warren, 83 N. E. 2d 82	10
Harris v. City of St. Louis, 111 S. W. 2d 995	10
Kern v. City Commissioners of City of Newton, 151 Kan. 565, 100 P. 2d 709	10
Lawrence v. Hancock, 76 F. Supp. 1004, 1009	10
Modern Amusements, Inc., v. New Orleans Public Service, 165 So. 137	10
Park Commissioners of Ashland v. Shanklin, 304 Ky. 43, 199 S. W. 2d 721	9
Shelley v. Kraemer, 334 U. S. 1, 13	11
St. Pierre v. United States, 319 U. S. 41	8
United States v. Alaska S. S. Co., 253 U. S. 113	8
United States v. Hamburg-American Co., 239 U. S. 466	8

IN THE

Supreme Court of the United States

October Term, 1953.

No. 85

JAMES W. MUIR, - - - - - *Petitioner,*

v.

LOUISVILLE PARK THEATRICAL ASSOCIATION, - - - - - *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (R. 20-35) is reported at 102 F. Supp. 525. The opinion of the Court of Appeals for the Sixth Circuit is reported at 202 F. 2d 275.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 20, 1953 (R. 83). The petition for a writ of certiorari was filed on May 21, 1953. The jurisdiction of this Court is invoked by petitioner under Title 28, United States Code, Section 1251(1), (Petitioner's Brief, p. 1). This section of the United States Code relates solely to the original jurisdiction of this Court, and not to the jurisdiction of this Court to grant writs of certiorari.

QUESTION PRESENTED.

Whether respondent, who leases from the City of Louisville a publicly owned and maintained amphitheatre located in a public park, can refuse petitioner admission to a theatrical production given by it in such amphitheatre on tender of the required admission fee, solely because of petitioner's race and color, without violating his rights to equal protection of the laws within the meaning of the Fourteenth Amendment.

STATEMENT.

The statement of facts by petitioner is substantially correct insofar as it goes. We, therefore, need only summarize the facts and call to the Court's attention certain additional facts.

The petitioner stipulated that:

(a) Louisville Park Theatrical Association is a non-stock, non-profit, private corporation which, entirely at its own expense and under its sole direction and supervision, produces and presents theatrical productions in Louisville, Kentucky;

(b) The Association has presented such productions, both in a City-owned facility and elsewhere in Louisville;

(c) The City of Louisville owns and maintains a structure located in Iroquois Park, known as the Iroquois Amphitheatre;

(d) The Association presented its productions in the Amphitheatre during a limited peroid in the summer months of the years 1947-1951;

(e) The Association's right to use the Amphitheatre during this period was governed by an agreement (R. 74-79) with the City, dated May 14, 1947.

(f) On July 22, 1949, the Association declined to sell him a ticket to one of its theatrical productions then being presented at the amphitheatre, solely because of the fact that he was and is a colored person of Negro blood and African descent (R. 18-19).

The City of Louisville has never denied petitioner or any member of his race the same right to use the Iroquois Amphitheatre as granted to the Association (R. 26).

There is no proof that the Association refused to allow petitioner, or any other Negro citizen, the right to use the Amphitheatre for a similar purpose.

Petitioner filed suit in the District Court, alleging that the Association, in presenting theatrical productions in the Amphitheatre owned by City was "carrying on a public function as agent of * * * the City of Louisville" (R. 12), and sought to compel the Association to admit him to all productions presented at the Amphitheatre.

After a hearing on the merits of the case, the District Court dismissed petitioner's complaint on the grounds that the act complained of was the sole act of the Association, in its capacity as a private corporation, not the act of the City of Louisville or any "arm" of the State and, therefore, not subject to the provisions of the equal protection clause of the Fourteenth Amendment (R. 31, 36). The District Court further held that the City of Louisville does not violate the Fourteenth Amendment in allowing the Association to "use the Iroquois Amphitheatre for private operation for a short period of time * * * where there is no showing that other groups, including any Negro organization, may not be allowed to lease the Amphitheatre under similar terms on a non-discriminatory basis." (R. 37).

In designating the points upon which he would base his appeal to the Court of Appeals for the Sixth Circuit, (R. 80-81), petitioner did not question the correctness of the District Court's ruling that the City of Louisville does not violate the Fourteenth Amendment to the Constitution of the United States in allowing the Association to use the Amphitheatre.

On appeal, the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court, holding that the Association, "a privately operated enterprise which leased from the City of Louisville an Amphitheatre in Iroquois Park, where the City did not participate either directly or indirectly in the operation of the private enterprise, was guilty of no unlawful discrimination, in violation of the Fourteenth Amendment, in refusing admission to colored persons to its operatic performances * * *" (R. 83).

The three agreements between the Association and the City (R. 62-79) as to the use of the Amphitheatre are no longer in effect, the last of them having expired in September 1951. The agreement set forth in Appendix "A" of petitioner's brief is not a part of the record in this case.

ARGUMENT.

I.

Title 28, United States Code, Section 1251(1), Under Which Petitioner Invokes the Jurisdiction of This Court, Relates Solely to the Original and Exclusive Jurisdiction of This Court.

Title 28, United States Code, Section 1251(1) provides:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more States;"

This section of the United States Code does not confer jurisdiction on this Court to entertain petitions for, or grant, writs of certiorari.

II.

The Lease Agreement Upon Which Petitioner Bases His Entire Argument Has Terminated and the Question Involved Based Thereon is Moot.

The petitioner has stipulated that Association is a private corporation and that the productions presented by it at the Amphitheatre are created entirely at its own expense and under its sole supervision (R. 18).

The District Court held that the City of Louisville does not violate the Fourteenth Amendment in leasing the Amphitheatre to the Association (R. 37). The petitioner did not question the correctness of this ruling in designating the points upon which he would base his appeal to the Court of Appeals for the Sixth Circuit (R. 80-81). The petitioner has, therefore, voluntarily precluded this Court from any consideration of whether the City of Louisville infringed upon any of his Constitutional rights in making a lease agreement with the Association.

The entire controversy as to whether or not the Association is an "arm of the State" and its acts subject to the restraints of the Fourteenth Amendment is, therefore, dependent upon the terms and provisions of the agreement between the Association and City of Louisville as to the use of the Amphitheatre, which

petitioner contends establishes such relationship. This agreement, dated May 14, 1947, by its own terms and provisions, terminated in September 1951 (R. 75). Two prior agreements which the petitioner tendered in evidence and included in the record (R. 62-74) terminated prior to this suit. Since the agreement, which was in effect at the time of the act complained of, has terminated, the questions of fact or conclusions of law founded on the relationship created by this agreement are now moot.

The petitioner has inserted, as Appendix "A" of his brief (Petitioner's Brief pp. 26-30), a certified copy of a purported agreement between the City and Association, dated February 5, 1952. This purported agreement is not a part of the record in this case. There is no proof in the record that the Association presented theatrical productions at the Amphitheatre during 1952 pursuant to this agreement. There is no proof in the record that the agreement was renewed for the 1953 season. There is no proof in the record that the Association is now giving performances at the Amphitheatre pursuant to said agreement. There is no proof in the record that the Association has refused petitioner admission to the Amphitheatre during any of the time when the purported agreement gave the Association the right to use the Amphitheatre.

It is a well established rule of law that a Federal Court is without power to decide moot questions or to give advisory opinions which cannot affect rights of the litigants in the case before it. *Amalgamated*

Association of Street, Electric Railway & Motor Coach Employees v. *Wisconsin Employment Relations Board,* 340 U. S. 416; *St. Pierre* v. *United States,* 319 U. S. 41; *United States* v. *Alaska S. S. Co.,* 253 U. S. 113; *United States* v. *Hamburg-American Co.,* 239 U. S. 466.

The question here involved, based solely on the agreement between City and Association, is now moot; and the petition for a writ of certiorari should be denied.

III.

Response to Reasons Assigned by Petitioner for Allowance Of the Writ.

1. This case seriously affects the right of Negro citizens to enjoy the benefits of publicly owned recreational facilities.

The public facility here involved is the structure known as the Iroquois Amphitheatre. The decision of the Court of Appeals for the Sixth Circuit (R. 83) in no way impairs the right of Negro citizens to make the same use of this structure as does the Association.

The decision of the Court of Appeals (R. 83) holds that the creation and presentation of a theatrical production by a private corporation, where the City does not participate therein either directly or indirectly, does not constitute State action merely because the production is given on publicly owned property.

This decision provides no strategem by which citizens may be deprived of the use of publicly owned recreational facilities.

2. Whether the respondent's operations in this case constitute State action presents a substantial federal question which should be independently determined by this Court.

On the undisputed facts, both the District Court and the Court of Appeals held that the Association was not acting on behalf of the City of Louisville or any agency of the State, but as a private individual.

The petitioner states that the decision here with respect to State action is contrary to Kentucky law governing public parks, and relies upon Park Commissioners of Ashland v. Shanklin, 304 Ky. 43, 199 S. W. 2d 721 (1947), and Board of Park Commissioners v. Speed, 215 Ky. 319, 285 S. W. 212 (1926). The petitioner in designating his reasons and grounds for appeal to the Court of Appeals (R. 80-81) did not specify or rely upon this which he now attempts to assert as a "fundamental error" and cannot now assert it.

No substantial federal question is presented by the facts of this case which require this Court to disregard the holdings of two lower federal courts.

3. Decisions among state and lower federal courts with respect to the status of leasing arrangements between municipalities and private organizations are in conflict and should be resolved..

The cases relied upon by petitioner do not reflect a conflict in the decisions as to public and private acts where a public agency owns and a private organization leases a public facility.

Modern Amusements, Inc., v. New Orleans Public Service, 183 La. 848, 165 So. 137 (1935), does not involve publicly owned property; it involves contractual differences between private corporations.

The decisions in Lawrence v. Hancock, 76 F. Supp. 1004; Culver v. City of Warren, 84 Ohio App. 373, 83 N. E. 2d 82 (1948); and Kern v. City Commissioners, 151 Kans. 565, 100 P. 2d 709 (1940), are in complete accord.

The present case can be distinguished from these three swimming pool cases. The similarity of those cases and this case is that all involve the lease of a public facility. The distinction, however, is of importance. In the three swimming pool cases the colored citizens were denied the use of the public facility. Here there is no showing that petitioner has been denied the right to use the public facility involved—the amphitheatre. The petitioner has the same right to use the amphitheatre as does the Association.

In Lawrence v. Hancock (*supra*), at page 1009, the Court recognized the right of a City to lease a public facility for private use as long as other citizens had a similar right.

The same right is recognized in Harris v. City of St. Louis, 233 Mo. App. 911, 111 S. W. 2d 995 (1938), and, therefore, is not in conflict with the swimming pool decisions.

4. The decision below is in conflict with principles established in decisions of this Court, particularly Nixon v. Herndon.

The principle of law governing this case was clearly stated by this Court in Shelley v. Kraemer, 334 U. S. 1, at page 13, wherein it said:

> "Since the decision of this Court in the Civil Rights cases, * * * the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct;"

The lower courts found that Association's creation and presentation of theatrical productions did not constitute it an "arm of the State" and its action of refusing to sell petitioner a ticket to one of its productions was merely private conduct of an individual.

The decision of the lower court is not in conflict with the principle that the City must make a unique piece of public property available for use by all citizens. The lower court pointed out that the petitioner had the same right as Association to use the public property, and had never been denied this right by the City (R. 26, 31, 37). There is no proof that the Association ever denied petitioner the right to use the Amphitheatre.

5. The decision in this case is in conflict with the principles enunciated by this Court in Nixon v. Condon, Smith v. Allright and Terry v. Adams, with respect to the delegation of State authority.

Before the principles enunciated in the primary election cases come into play there must be a determination that there is a governmental function involved.

There is no proof in the record that the creation and presentation of theatrical entertainment is a governmental function.

In substance, the petitioner is here contending that the ownership of an out-door auditorium obligates a City, as a governmental function, to provide every type of activity which can be presented in such a structure. Following such a contention to its conclusion, the petitioner assumes that any person using the structure for any activity is an instrument of the State and is carrying on a governmental function.

The Amphitheatre is well suited for religious services. In allowing a church organization to use the structure, has the City constituted this group an instrument of the State and religious services a governmental function?

The City did not delegate a governmental function to Association in allowing it to use the Amphitheatre as a place to present shows created and presented entirely at Association's expense.

6. The decision of the court below conflicts with well-settled doctrine of this Court that rights guaranteed under the Fourteenth Amendment are personal and present.

There is no conflict between this doctrine and the decisions of the two lower courts. The District Court very carefully pointed out that petitioner had the personal and present right to make the same use of Iroquois Amphitheatre as did the Association (R. 37). The petitioner has never exercised this right, or sought to do so, and has therefore never been denied such right (R. 26, 37).

CONCLUSION.

For the reasons heretofore stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

JAMES W. STITES,
DONALD Q. TAYLOR,
Counsel for Respondent.

July 17, 1953.